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IN THE

Supreme Court

Of The United States

OCTOBER TERM, 1974

74-266

STANLEY V. TUCKER

Petitioner

vs.

DAVID T. WIGGINS, ET AL.

Respondents

ON PETITION FOR
WRIT OF CERTIORARI
TO THE CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT
BRIEF FOR RESPONDENTS IN OPPOSITION

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1. Cases:

a. *Central Manufacturing Co. v. B.M.K. Corporation*, 160 Fed. Supp. 318. 9

b. *Hagan v. Whitman* (CCA 9th, 1966) 356 F.2d 742 10

c. *MacNeil Bros. v. Forte* (CCA 1st, 1958) 253 F.2d 500. 10

d. *St. Marie v. U.S.* (CCA 9th, 1940) 108 F. 2d 876, Cert. denied 311 U.S. 652. 11

2. Miscellaneous:

a. Rule 2(c) Local Rules of Procedure for United States District Court, District of Connecticut. 11a

b. Rule 7, Local Rules of Procedure for United States District Court, District of Connecticut. 9

c. Rule 7, Federal Rules of Appellate Procedure. 9

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Prior Action

There has been no prior action by the Court in this matter.

Opinions Below

The decision delivered in the Court below is not as yet officially reported, but is appended to the Petition for a Writ of Certiorari. The Motion to Dismiss of the Respondents was granted on January 15, 1974, the Motion to Re-Open the Judgment of Dismissal was denied on July 29, 1974.

Jurisdiction

The Respondents do not question the jurisdiction as set forth in the petition.

QUESTIONS PRESENTED

Petitioner's Brief mistakes the nature of the questions to be reviewed. The issues are

1. Was notice mailed to the petitioner at the address on file with the Clerk of the District Court, which address had not been changed by the Petitioner, proper notice?

2. Where the Petitioner was required by order of the District Court to file a $250 cost bond for each Respondent, but thereafter Petitioner filed only a single $250 cost bond and filed no appeal bond, had the Petitioner complied with the requirements of Rule 7 of the Federal Rules of Appellate Procedure?

3. Where Petitioner filed no appeal bond, was Petitioner entitled to file a purported increase in bond after judgment of dismissal was entered by the Circuit Court?

4. Was Respondents' Motion to Dismiss properly granted when it alleged Petitioner failed to file bond for costs as required by Rule 7 of the Federal Rules of Appellate Procedure?

5. Did Respondents "waive" their right to file a motion for dismissal of the Petitioner's Appeal where such motion was filed one week after the receipt of the record which showed no appeal bond to have been filed and before the Petitioner mailed his Brief on January 8, 1974?

STATEMENT

The Petitioner has made a "Statement of Factual Background" a part of his petition for certiorari. This statement contains nothing which has ever been introduced in evidence before a court and its contents have no bearing on the questions presented in the petition for certiorari.

The facts as shown by the record are as follows:

1. The Petitioner's action was dismissed in the District Court for failure to state a claim upon which relief can be granted with costs to the defendants on October 16, 1973.

2. Prior to the dismissal and upon separate application by each of the Respondents, David T. Wiggins, Individually, David T. Wiggins, in his capacity as Director of State Department of Health for the State of Connecticut, Richard Woodhall, individually, Richard Woodhall, in his capacity as Assistant to the Director of the State Health Department, James P. Herlihy, individually, James P. Herlihy, as Senior Public Health Sanitarian for the City of Hartford, James P. Gorry, individually, James P. Gorry, as Chief Plumbing Inspector for the City of Hartford, Edward Cowles, individually, and Edward Cowles, as Housing Inspector for the City of Hartford, the Petitioner was ordered to file a $250.00 bond as security for costs.

3. Instead of ten $250.00 bonds as required by the foregoing orders, the Petitioner filed one $250.00 bond with the Clerk of the District Court for the District of Connecticut.

4. The address of the Petitioner on file with the Clerk of the District Court was 963 Capitol Avenue, Hartford, Connecticut.

5. No change of address was ever filed with the Clerk of the District Court.

6. On October 30, 1973, the Petitioner filed a Notice of Appeal to the Second Circuit Court of Appeals dated October 27, 1973.

7. On November 27, 1973, the Petitioner filed a Designation of Record and Statement of Issues.

8. On December 7, 1973, the Record On Appeal and Index To Record On Appeal was forwarded to A. Daniel Fusari, Esq., Clerk, United States Court of Appeals for the Second Circuit.

9. On said Record On Appeal, Stanley V. Tucker, pro se, 963 Capitol Avenue, Hartford, Connecticut, 06106, was shown as Attorney for the Plaintiff.

10. No appeal bond was shown on the Record On Appeal.

11. On December 14, 1973, the Respondents filed a Motion to Dismiss on the grounds that the appellant failed to file a bond for costs as required by Rule 7, Federal Rules of Appellate Procedure and a copy of this Motion was mailed postage prepaid to Stanley V. Tucker, 963 Capitol Avenue, Hartford, Connecticut, 06106.

12. On January 15, 1974, the Respondents' Motion to Dismiss was granted by the United States Court of Appeals for the Second Circuit.

13. On January 25, 1974, the Petitioner filed a Motion to Re-Open Judgment of Dismissal in the United States Court of Appeals for the Second Circuit.

14. On May 6, 1974, the Petitioner filed with the United States Court of Appeals for the Second Circuit, an "Application for Appellant's Voluntary Increase of Cost Bond On Appeal To Five Hundred Dollars and To Vacate The Order of Dismissal."

15. On July 29, 1974, the United States Court of Appeals for the Second Circuit denied the Petitioner's motion for Reinstatement of the Appeal.

ARGUMENT

I. A costs bond filed in the District Court does not meet the requirements of an appeal bond required under Rule 7 of the Federal Rules of Appellate Procedure.

On June 23, 1973, the Petitioner filed a cost bond with the Clerk of the United States District Court for the District of Connecticut. The Petitioner had been ordered to post a $250.00 bond for each defendant or bonds totaling $2,500.00. This the Petitioner did not do. Under Local Rule 7, each defendant is entitled to request a bond for costs in the amount of $250.00 and this bond has no bearing on a subsequent bond in the amount of $250.00 required under the provisions of Rule 7 of the Federal Rules of Appellate Procedure. The defendants would be within their rights in seeking execution against the bond filed by the Petitioner for costs in the District Court.

> "The costs of the trial court, upon judgment rendered, follow that judgment or are merged in it. In the absence of a supersedeas bond (under 73 (d)), the prevailing party below may issue execution against the defendant on his judgment and collect both judgment and costs. Even though the judgment be six cents and the costs substantial, they both may be collected by execution. Indeed, I assume if the judgment be merely for costs, such costs may be collected by execution."
>
> *Central Manufacturing Co. v. B.M.K.Corporation*, 160 Fed. Supp. 318, 321.

Under the provisions of Rule 7 (F.R.A.P.) only the costs of appeal are subject to the appeal bond, not district court costs, unless a supersedeas bond was filed. Rule 7 (F.R.A.P.) specifically sets out what the appeal bond shall contain. The cash bond filed by the Petitioner contained none of these requirements.

II. Notice mailed to Petitioner's address on file with the Clerk of the District Court constitutes good notice of Motion to Dismiss.

The Petitioner claims that he received no notice of the Respondent's Motion for Dismissal, although it was mailed to his address on file with the Clerk of the District Court. It should be pointed out that the Brief that Petitioner relies on to show that his address was different than that on file with the District Court Clerk, was filed in January, 1974, after the Motion to Dismiss was filed and he has offered nothing to show that he requested his mailing address to be changed. Local Rule 2 (c).

III. The Circuit Court may dismiss an appeal for failure to file an appeal bond.

The dismissal of an appeal where a bond or appeal has not been filed is a matter of discretion with the Court. See *Hagan v. Whitman*, 356 F.2d 742 (1966) CCA(9), *MacNeil Bros. v. Forte*, (CCA 1st, 1958) 253 F2d 500.

The Court of Appeals for the Second Circuit not only reviewed this matter on the original motion to dismiss, but reviewed it a second time on the Petitioners motion to reopen the judgment of dismissal.

In conclusion, it might be pointed out that in the case of *St. Marie v. U.S.* (9th CA) 1940, 108 F2d 876, Cert. denied 311 U.S. 652, the Court did not state that failure to file a cost bond is not ground for dismissal of appeal where no specific relief is asked on this score and where there is no showing of disadvantage to the appellees. On the contrary, the court in its opening specifically stated it was not considering this question because it had not been raised.

The Petitioner failed to follow the rules in both the District Court and the Circuit Court of Appeals. He has been denied none of his rights.

CONCLUSION

For the reasons stated above, Respondents say that a Petition for Writ of Certiorari should be denied.

Respectfully submitted,

Respondents

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